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No. 92-67

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER,

v.

ORESTES LUCIANO ABREU

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DAVID THORNBRUGH

RESPONDENT'S BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID K. SMITH
Attorney for Abreu
6925 Union Park Center, #600
Midvale, Utah 84047
(801) 566-3373

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QUESTION PRESENTED

Should the words "second or subsequent conviction" under 18 U.S.C. 924(c) be interpeted to impose a more severe sentence on persons convicted of multiple 924(c) violations arising from single indictment?

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RESPONDENT'S BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

David K. Smith, on behalf of Orestes Luciano Abreu, replies to the Solicitor General's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in the above cases.

OPINIONS BELOW

The en banc opinion of the court of appeals as well as the panel opinions disposing of the respondents' other claims are not repeated here, since they are set forth in full in Petitioner's Brief (See Petitioner's Appendix, la-l9a, 20a-44a, and 45a-62a). Also see *United States v. Abreu*, 962 F.2d 1447-1455, (lOth Cir.) (en banc), cert pending, No. 92-

67 (1992); *United States v. Thornbrugh*, 962 F.2d 1438-1447, (10th Cir. 1992); and *United States v. Abreu*, 962 F.2d 1425-1437 (10th Cir. 1992).

JURISDICTION

The judgment of the en banc court of appeals was entered on April 13, 1992. The jurisdiction of this Court is envoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1) of Title 18 of U.S.C. currently provides in relevant part: [1]

Whoever, during and in relation to any crime of violence or drug trafficking crime ***, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years ***. In case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years ***. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

STATEMENT

1. Respondent, Abreu, and a co-defendant, Juan Carlos-Alvarez, were found to have sold cocaine in Utah from approximately March, 1987 to April 3, 1988. In approximately January, 1988, a customer gave Alvarez a Mini-14 semi-automatic rifle (hereafter "rifle") and a .38 caliber revolver (hereafter "gun") as collateral for a credit purchase

(1) Respondent Abreu committed the offenses at issue on April 3, 1988. At that time, Section 924(c)(1) mandated a sentence of ten years for any "second or subsequent conviction." See 18 U.S.C. 924(c)(1) (Supp V 1987). The statute was amended by the Anti-Drug Abuse Act of 1988, Pub L. No. 100-690, Section 6460(2)(A), 102 Stat. 4181, 4373 (Nov. 18, 1988), to require a mandatory sentence of 20 years in the case of any second or subsequent conviction. See 18 U.S.C. 924(c)(1) (1988).

7 oz. of cocaine. The customer never came back to pay for the remainder owing on the cocaine purchase or to redeem the collateral; hence, respondent and Alvarez retained possession of the rifle and gun in a bedroom of an apartment they shared in Salt Lake until the date of their arrests. 9/12/89 Tr. 54-77, 85-86, 89-91, 152-53, 159-61; 9/13/89 Tr. 42-46.

2. In February, 1988, a government informant made several controlled purchases of cocaine from Alvarez. On March 10, 1988 federal agents tried to use the information to make a large-scale controlled purchase from Alvarez; that proved unworkable, however, because a customer told Alvarez that it looked too much like a "set-up"; no transaction was ever consummated. 9/11/89 Tr. 6, 9, 12, 19-20, 99-100; 9/13/89 Tr. 31, 42.

3. Federal agents arrested Abreu and Alvarez on April 3, 1988. After obtaining a search warrant, the agents searched their Salt Lake apartment, and seized approximately two ounces of cocaine which had been diluted into a mixture of unknown substance weighing 641.8 grams, and which was found in the kitchen area with drug paraphernalia. They also seized the rifle and gun used as collateral which were found in the closet in one of the bedrooms. 9/11/89 Tr. 4-36, 40-42, 73, 76-78; 9/12/89 Tr. 29-30; 9/13/89 Tr. 31.

4. At trial Abreu was convicted of conspiracy to possess and distribute cocaine on April 3, 1988, in violation of 21 U.S.C. 846 (Count 1); possession of more than 500 grams of cocaine with intent to distribute on April 3, 1988, in violation of 21 U.S.C. 841(a)(1) (Count 2); use of the semi-automatic rifle in connection with a conspiracy offense charged in Count 1, in violation of 18 U.S.C. 924(c) (Count 3); use of the same rifle in connection with substantive possession offense charged in Count 2, in violation of 18 U.S.C. 924(c) (Count 4); use of the .38 caliber revolver in connection with the conspiracy offense charged in Count 1, in violation of 18 U.S.C. 924(c) (Count 5) and use of the .38 caliber revolver in connection with the substantive possession offense charged in Count 2, in violation of 18 U.S.C. 924(c) (Count 6). Record, 129.

5. Following trial the district court ruled that Abreu should be sentenced to 200 months on both the conspiracy charge (Count 1) and on the possession charge (Count 2), and that both sentences should be served concurrently; he further ruled that Abreu should serve 60 months on the 924(c) gun charge (Count 5) to be served consecutively to Counts 1 and 2, and another 120 months as a "second or subsequent conviction"

on the 924(c) rifle charge (Count 4), to be served consecutively to the sentences imposed in Counts 1, 2, and 5. Sentencing on the 924(c) rifle conviction in Count 3 and the 924(c) gun conviction in Count 6 were stayed by the court. Record 129.

6. The Respondent had previously plead guilty on a failure to appear charge (Count 7) and was sentenced to 18 months consecutive to serving sentences on Counts 1, 2, 5 and 4. Record 129.

7. Abreu challenged his 120 month enhanced sentence imposed by the district court judge under 924(c), and the Tenth Circuit chose to address the issue *en banc. United States v. Abreu,* 962 F.2nd 1447 (lOth Cir. 1992). The Tenth Circuit Court of Appeals vacated Abreu's 924(c) enhanced sentence of 120 months imposed under Count 4 and remanded the case to the district court for further sentencing consistent with its findings. *Abreu,* supra, at 1454.

8. The *en banc* court found the language of Section 924(c)'s enhancement provisions to be ambiguous in two respects. The court found that while the words "second or subsequent" could arguably be read to refer to multiple events occurring at the same point in time, they could also be read as referring to two or more events occurring sequentially. Second, the court found that the term "conviction" is not defined in the same way in every federal statute, and thus, creates its own ambiguity. The court thus found it difficult, if not impossible, to discern the "plain meaning" of "second or subsequent conviction" language in section 924(c). *Id.* at 1450.

9. When looking to the legislative history, the court found that since the "second or subsequent conviction" language was inserted by way of floor amendment, and since there was little discussion on the matter, the floor debate was not terribly illuminating in helping one to determine the intent of Congress. The court thus ruled that the doctrine of lenity should be applied to afford the defendant the less severe result. *Id.* at 1450.

10. The court also declared that enhanced-penalty regimes in other enhanced-penalty statutes were set up in such a manner as to allow unenhanced penalties to attempt to rehabilitate first-time offenders before increased penalties are imposed. *Id.* at 1452.

REASONS FOR DENYING THE PETITION

The United States in this petition has acquiesced in the petition for

writ of certiorari in *Deal v. United States,* 954 F.2d 262 (5th Cir.), petition for cert. pending, No. 91-8199 (1992), and submits that the issues presented in *Deal* are identical to this case. While some of the issues are similar, others are not. Were this court to follow *Deal,* given the factual background of that case, it would only serve to expand the effect of Section 924(c).

If this court wishes to resolve the conflict which now exists between Circuits 2, 4, 5, 6, 7, 8, and 11[2] and the 3rd and 10th Circuits[3] relative to the interpretation and application of 924(c), it would want to carefully consider (a) whether the section is inherently ambiguous, and thus subject to multiple interpretations, (b) whether Congress gave some indication of how this section should be interpreted, (c) whether incongruous results are mitigated by whichever interpretation is adopted, (d) whether the rehabilitative and retribution underpinnings of the statute are kept intact, (e) whether any adoption of an approach protects against a Double Jeopardy attack, and (f) whether the social policy bases of the act remain viable after a solution is fashioned.
The arguments presented in the various districts seem to be based upon a step-by-step analysis of 924(c).

DEFINITIONAL ANALYSIS OF SECTION 924(C)

After visiting various rules of construction helpful to the court in determining the meaning of the words "second or subsequent conviction", the first step in the analysis of section 924(c) is to determine if the words, standing by themselves, convey a plain meaning or whether they are subject to multiple interpretations, and are therefore, ambiguous. *The Rawlings*[4] court and the Abreu court have applied various rules of

(2) *United States* v. Bernier, 954 F.2d 818 (2d Cir. 1992); *United States v. Raynor,* 939 F.2d 191 (4th Cir. 1991); *United States v. Deal,* 954 F.2d 262 (5th Cir. 1992), petition for cert. pending, No. 8199; United States v. Nebors, 901 F.2d 1351 (6th Cir. 1990); *United States v. Bennett,* 908 F.2d 189 (7th Cir.), cert. denied, 111 S.Ct. 534 (1990); *United States v. Foote,* 898 F.2d 659 (8th Cir.), cert. denied, 111 S.Ct. 112 (1990); *United States v. Rawlings,* 821 F.2d 1543 (11th Cir.), cert. denied, 484 U.S. 979 (1987).

(3) *United States v. Torres,* 862 F.2d 1025 (3rd Cir. 1988) (this case has been called a fluke because the government stipulated and the court consented that only one 924(c) enhanced sentence should be imposed for two predicate offenses); *United States v. Abreu,* 962 F.2d 1447-1455 (10th Cir.) (en banc), petition for cert. pending, No. 92-67 (1992); and in the 8th Circuit a panel recently suggested that the court should reconsider its holding in *United States v. Foote,* 898 F.2d 659 (8th Cir.), cert. denied, 111 S.Ct. 112 (1990), in light of the Tenth Circuit's holding in Abrue, supra. See *United States v. Jones,* No. 91-1987 (8th Cir. June 9, 1992), slip op. 22.

(4) United States v. Rawlings, supra, 1545.

construction.

Rawlings suggests that the language itself is conclusive absent a clearly expressed legislative intent to the contrary. *Id.* at 1445. *Rawlings* then states that the courts need not review the legislative history unless it finds the plain meaning of the terms not readily apparent. *Id.* at 1445. The *Rawlings* court asserts that the words as used in 924(c) are to be given the common and ordinary meanings, and the court should attempt to construe the statute so as to give each word in full effect. *Id.* at 1445.

The *Rawlings* court goes on to analyze the statute in light of the definitional meanings of the words "second" and "subsequent" and finds the meanings plain and understandable, and not at all ambiguous. *Id.* at 1445, 1446.

On the other hand, the *Abrue* court, also drawing from definitional meanings, while agreeing that the statute is to be interpreted taking the ordinary and contemporary and common meanings of the words used, found after analysis that the words "second" and "subsequent" could be read to refer to multiple events occurring at the same point in time as well as to two or more events occurring sequentially in time. Thus, the court found the words "second" or "subsequent" to be ambiguous. *Abreu,* supra, at 1449.

Interesting here is that the courts relied upon different definitial readings of the word "second" to substantiate their findings that the word was either clear or ambiguous.

Even more disturbing to the *Abrue* court was the fact that *Rawlings* and its progeny failed to analyze the word "conviction" which the *Abrue* court stated was "chameleon"-like, and was subject to more than one interpretation. *Id.* at 1449.

LEGISLATIVE HISTORY ANALYSIS OF SECTION 924(c)

Rawlings then turns to the legislative history of the act, and finds the statements made by Representatives Poff and Rogers does not support a reading that 924(c) requires one to be convicted and sentenced before the enhancement penalties apply. *Rawlings,* supra, 1546, 1553.

When analyzing the legislative history of 924(c) to assist the *Abrue* court in finding the meaning of "second or subsequent conviction", the court was even more convinced that the meaning to be given, though not clear, probably tended to support a sequential definitional approach. *Abrue,* supra, 1450.

Where there is some question of ambiguity in the wording of a statute, and the legislative history is not particularly helpful in resolving the desired intent of Congress, if indeed, there ever was one formulated, the courts then should apply the doctrine of lenity so as to give the statute the less harsh application. After all, this court has stated "When Congress has the will it has no difficulty in expressing it — when it has the will, that is, of defining what it desires .... When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States,* 349 U.S. 81 at 83. (1955) Such was the finding by the *Abreu* court. *Abreu*, supra, at 1453.

CONCERN OVER INCONGRUOUS RESULTS

In the event this court grants the United States petition for a writ of certiorari in this case, it will no doubt wish to fashion a definitional approach to 924(c) that effectively deals with as many variations of 924(c) offenses as possible. For example, the *Rawlings* court, and those other circuits that have followed the Rawlings approach, were concerned about incongruous results if the statute were read to require a prior conviction and sentence, before imposition of the section 924(c) enhancement provisions.(4) Judicial economy would be compromised, they argue, and attempts to manipulate the court system by the defendants and the prosecution would inevitably result. Prosecutors would then bring counts now brought together in a single indictment under separate indictments to insure the defendants received 924(c) enhanced sentences. *Id.* at 1546.

On the other hand, as has been stated in a different context, but while is equally relevant here: The court should "strike an appropriate balance between competing policies of preservation of the accused's important rights and economical judicial administration." *United States* v. *Valentine,* 706 F.2d 282, 291 (10th Cir. 1983).

In any event, a prosecutor must charge a 924(c) violation in the same indictment as a substantive charge in order to avoid a Double Jeopardy bar. To avoid the Double Jeopardy issue, the courts must find that a 924(c) violation is subsumed into the substantive conviction The requirement that a conviction under 924(c) must precede commission of other offenses under that section for purposes of enhancement obviates the incongruous results perceived by the *Rawlings* court.

Rawlings, supra, 1546.

REHABILITATIVE AND RETRIBUTION ANALYSIS OF SECTION 924(c)

The *Rawlings* court, and other circuits that have followed Rawlings have offered little analysis relative to the rehabilitative intent of 924(c). This court has recognized that "the reformation and retribution theories of punishment (are) the primary reasons for imposing greater penalties on the repeater." *Moore* v. *Missouri,* 159 U.S. 673, 677, 16 S.Ct. 179, 181, 40 L.Ed. 301 (1895).

The retribution and rehabilitative approaches are evidenced in the legislative history. The legislative history of 924(c) suggests that after serving a jail sentence by committing a crime of violence (or drug trafficking) with the use of a gun, one who "does it a second time" will have to face an enhanced sentence. *Rawlings,* supra, 1546.
If one is to be reformed, one must first be given an opportunity to learn from his first mistake. This suggests imposition of 924(c) enhancement provisions in a sequential fashion. Such was also the finding in *Abrue. Abreu,* supra. 1452-3.

Nor does this approach do violence to the asserted "incongruous results" argued by Rawlings and others. If indeed, 924(c) is designed to offer "retribution" for subsequent offenses, and to provide an opportunity for rehabilitation for those involved in gun-related crimes of violence by discouraging them from such future conduct or face the possibility of a much enhanced charge (5 years vs. 20 years), and if section 924(c) creates a distinct offense rather than being a sentencing enhancement, as seems to be the case, then, indeed, if a prosecutor brings several gun-related violent counts in one indictment, only one 924(c) charge could be brought at one time. This does not prohibit the court, however, from sentencing the other substantive counts fully and on their own merits.

Under the criminal justice system we now embrace prosecutors may "carve up" criminal conduct into multiple counts, even if some of the counts include lesser included offenses, or constitute repetitive counts of the same conduct. Two reasons appear relevant for allowing prosecutors to do so. First, it may be uncertain that a jury would convict a defendant on one count, when it may convict more readily on another. The prosecutor is merely covering his bases. Secondly, allowing a

prosecutor to state multiple counts in a single indictment also helps prevent problems of proof, thus helping to insure the genuinely guilty person from escaping guilt by some technical means. The prosecutor is not forced to gamble on obtaining a major conviction when he is permitted to charge multiple counts. *United States v. Luskin,* 926 F.2d 372, 377 (4th Cir. 1991).

DOUBLE JEOPARDY ANALYSIS OF SECTION 924(c)

There is at least one Constitutional prohibition against imposing consecutive sentences under 924(c) - the Constitutional prohibition against Double Jeopardy. Double Jeopardy problems are a distinct concern in section 924(c) sentencing, because of the add-on nature of the statute. The court should give consideration to whether the section 924(c) charges are duplicative under the Double Jeopardy analysis. When the underlying crimes meet the test drawn in *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 302 (1932), they are assumed not to be subject to Double Jeopardy attack, and consecutive sentences are permitted. On the other hand, "(t)he *Blockburger* test is simply a 'rule of statutory construction', a guide to determining whether the legislature intended multiple punishments." *Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084, 2090, 109 L.Ed.2nd 548 (1990). In *Grady,* this Court held that successive prosecutions are barred when both prosecutions require proof of the same "conduct." *Id.* at 2090. It is argued that in Abreu proof of the same and identical conduct was presented to secure convictions on both the conspiracy and on the possession charge. It is also clear that if a person is charged with the exact same drug trafficking crime and is charged with two section 924(c) offenses only because the defendant carried or used two guns as opposed to one, that only one 924(c) sentence may attach. *United States v. Henry,* 878 F.2nd 937, 942-45 (6th Cir. 1989) The *Henry* court held there must be a separate underlying crime for each section 924(c) charge; the number of guns is not the determining factor. *Id.* at 945. This may be one reason why the district court judge in *Abreu* stayed imposition of sentence in Count 3 and Count 6 of the Second Superseding Indictment.

If criminal counts are identical, the defendant should be protected because Double Jeopardy would require that such counts run concurrently rather than consecutively. *Luskin,* supra, at 378.

To determine if counts are sufficiently identical to warrant concur-

rent sentences for Double Jeopardy purposes, one should look to 924(c) to see if there is an "episode" test defined. The Luskin court found there is no definition in 924(c) which describes what is meant by a single criminal episode for purposes of enforcing the enhancement provisions of the statute. *Id* at 376.

Where the intent of Congress as to the unit of prosecution cannot be clearly discerned, doubt should be resolved in favor of lenity. Thus where Congress fails to provide a definition concerning the unit of prosecution, doubt is to be resolved against turning a single transaction into multiple transactions. *United States v. Valentine,* 706 F.2nd 262, 293 (lOth Cir. 1983).

It is believed that such an approach properly reflects the purpose and legislative desire with respect to enhanced sentencing statutes.
Secondly, the courts have previously recognized procedural due process limitations in cases "involving attenuated relationships between the conspirator and the substantive crime." United States v. Johnson, 886 F.2nd 1120 (9th Cir. 1989); *United States v. Alvarez,* 755 F.2nd 830, 850 (llth Cir.), cert. denied, 474 U.S. 905, 106 S.Ct. 274, 88 L.Ed.2d 235 (1985). It is believed that there is a less than clear distinction between the conspiracy and the possession charges for which Abreu was convicted.

LENITY SHOULD BE APPLIED ON 924(c) ENHANCEMENTS WHEN OFFENSES ARISE OUT OF A SINGLE CRIMINAL TRANSACTION

This court will also wish to fashion an approach which deals with as many variations of a section 924(c) offense as possible. For example, in *Deal,* the defendant was charged and convicted of committing six armed robberies on six different banks over a period from January through April, 1990. In each robbery a handgun was used. *Id.* at 262. In this case each criminal transaction is distinct in terms of time and place.

In Abreu the criminal episodes are not distinct in terms of time or place, and are more difficult to separate in terms of offenses. The prosecution and the court seemed to acquiesce in the fact that this case involved but a single criminal transaction, using exactly the same set of facts, the defendant was charged with and convicted of two counts: (a) conspiracy to possess cocaine with the intent to distribute, and (b) possession of cocaine with the intent to distribute. Because two guns

were found in the apartment, Abreu was sentenced to 60 months under 924(c) for use of the gun on the possession charge, and another and enhanced 120 months under 924(c) for use of the rifle on the conspiracy charge.

No fact situation in the other circuits is the same as *Abreu.* The most closely related is the *Nabors* case where the defendant was convicted of assaulting a federal agent, possession of crack cocaine with intent to distribute, using a single firearm during the commission of both a violent crime and attempted escape. There the defendant, who was on probation, shot at a federal agent, when he attempted to serve a warrant. Found in the apartment at the same time, were 12.757 grams of crack cocaine and cocaine paraphernalia. The court found that the gun used to shoot at the agent was also used in relation to the possession of the drug trafficking charge. The Court found that the defendant could properly have been charged with two 924(c) offenses in the same criminal episode. *Nabors,* supra, at 1353.

While prosecutors have broad discretion in fashioning counts to any indictment, just as they may combine several discrete offenses from separate transactions into one indictment, a careful prosecutor may also be able to fashion several charges from the same transaction in one indictment. The courts, however, should not impose separate sentences when Double Jeopardy is involved. The best methodology is to impose the sentence to the most factually inclusive offense in a situation where a conviction on a less factually inclusive offense would have been upheld. *United States vs. Gomez* 593 F.2nd 210, 214 (in banc), cert. denied, 441 U.S. 948, 99 S.Ct. 2172, 60 L.Ed.2nd 1052 (1979).

The Blockburger test normally applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. *Blockburger,* supra, 304.
There is nothing in the legislative history of 924(c) which indicates that Congress foresaw or considered how a court should determine the number of crimes of violence that have occurred in a single criminal transaction. *U.S. v. Chalan,* 812 F.2nd 1302, 1307 (lOth Cir., 1987). And where the statute and legislative history are vague, the courts are again governed by the doctrine of lenity: "(I)f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses...." *Bell v. United States,* 349 U.S. 81, 84, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955), see also *United States v. Valentine,* 706 F.2nd 282,

292-93 (lOth Cir. 1983).

In Abreu the government argues that since one of the elements in a "conspiracy" charge does not require actual "possession" and since one of the elements in a "possession" charge does not require an "agreement" with another, then the elements are different, even though arising from a single criminal transaction, such that the Blockburger test is satisfied. We reject this argument because the prosecutor in the case was able to fashion two criminal counts from the same set of factual circumstances. No other or different facts need have been or in fact were presented to prove one or the other. Lenity requires a less stringent approach when applying 924(c) enhancements. Even the trial court judge seemed to acknowledge this when sentencing Abreu, because he made the conspiracy and the possession charges run concurrently and not consequtively, as he might have done.

CONCLUSION

The petition for writ of certiorari should be denied in this case, since the Tenth Circuit's reasoning and analayis is more persuasive than *Rawlings* and its progeny. On the other hand, if the court desires to grant the petition of the United States for a writ of certiorari to resolve the conflict which now exists among the various circuits, the Abreu case offers a better platform than *Deal,* supra, No. 91-8199, to fashion a resolution.

Respectfully submitted.

David K. Smith
Counsel for Abreu

December, 1992